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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 21.

BACARDI CORPORATION OF AMERICA, *Petitioner*,

v.

MANUEL V. DOMENECH (formerly Rafael Sancho Bonet), TREASURER, *Respondent*,

and

DESTILERIA SERRALLES, INC., *Intervenor-Respondent*.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

The brief for respondent treasurer of Puerto Rico relies upon arguments developed under 14 main headings and expanded under 62 subdivisions. The brief for the intervenor-respondent is of a less complicated construction. Some of the material in both is irrelevant and much of it merely attempts to meet petitioner's main brief. Certain other arguments may properly be answered in reply.

We shall refer to the brief for the treasurer of Puerto Rico as that of "respondent" and to the brief for Destileria Serralles, Inc. as that of the "intervenor". When both are referred to, we shall speak of "respondents".

Apart from questions of conflict with a treaty of the United States (The Inter-American Convention for Trade Mark and Commercial Protection) and a statute of the United States (Federal Alcohol Administration Act), hereinafter treated, there remains a basic question of whether the police power available to the Puerto Rican legislature can possibly be enlarged to sustain laws designed in their inception and operation to control the names under which goods manufactured in Puerto Rico can be marketed in the United States and elsewhere. Errors into which respondents have fallen in their conception of the police power of Puerto Rico, as being almost unlimited in extent, will be developed as our first point in reply. Questions raised by their treatment of the conflicts with the treaty and federal statute will be discussed in that order. Finally, the point of estoppel, not heretofore mentioned by respondents in this Court, will be answered briefly, as one completely lacking in substance.

I.

The Scope of the Police Power Which May be Exercised by the Puerto Rican Legislature Has Been Greatly Exaggerated by Respondents.

The briefs of respondent and intervenor make it clear that the intent of the Puerto Rican legislature is to prevent the sale in the United States or elsewhere, but principally in the United States, of rum manufactured in Puerto Rico which bears petitioner's trade marks of Cuban origin. These briefs do not deny that

the legislation is aimed against petitioner and is effective solely against it, although the record shows that other corporations foreign to Puerto Rico are distilling rum there and that other trade-marks of foreign origin are being legally used to identify such rum.

Respondent admits (Brief, p. 56) that the issues of due process and equal protection raised by petitioner are substantial but both the answering briefs rely upon the argument that the police power overrides these guarantees (Respondent, brief, pp. 26-38; Intervenor, brief, pp. 24-31). Respondent refers to the powers of the English Parliament (Brief, p. 30), hardly applicable here. Both briefs liken the police powers of Puerto Rico to those of a state. Each concludes that a state is in a position of inferior power because hampered by the commerce clause of the federal Constitution (Art. I, Sec. 8, cl. 3), which, they say, does not apply to Puerto Rico. (Respondent, brief, p. 32; Intervenor, brief, p. 52).

Unlike the powers of a state and of the English Parliament, all Puerto Rican legislative powers are granted solely by Congress, subject to constitutional checks. The power actually granted in this case is confined to "all matters of a legislative character not locally inapplicable." (Organic Act of Puerto Rico, Sec. 37; Title 48, U. S. C. Sec. 821.) This Court has stated the matter in *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253, 260:

> "These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect of which this court said in *Clinton* v. *Englebrecht,* 13 Wall. 434, 441, that the theory upon which these territories have been organized 'has ever been that of

> leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress;' ".

And see also *Domenech* v. *Havemeyer,* 49 F. (2d) 849, 850.

The Court in the *Shell* case was careful to point out that the power conferred was one to legislate in *local* matters (p. 262). It nowhere appears that Puerto Rico has been given any power to pass legislation whose principal and intended effect is to direct the course of trade and commerce beyond the borders of the Island.

Contrast this limited grant of power with the purpose of the statute here attacked. The only restriction placed upon the manufacture of rum in Puerto Rico is that it shall not be marketed in the United States or any other possible consuming market under trademarks theretofore known to the public in those places, unless such marks were used on Puerto Rican rum prior to February 1, 1936 or unless they were used solely in the United States and not elsewhere.

While the prohibition against the use of these trademarks applies equally to sales in Puerto Rico as well as abroad, no one pretends that the purpose of the legislation was other than to try to give certain established distillers in Puerto Rico a preferred position in the sale of their rum to consumers in the United States.

Section 44(b) of the Act points out this purpose with finality. The opinion of the District Court shows that this bulk shipment provision of the statute is not applicable within the Island of Puerto Rico, but merely prevented shipments of rum in bulk to places outside of Puerto Rico (R. 102):

"It will be noted that such rum may be legally sold in Puerto Rico in bulk or barrels, but this Act undertakes to deny the plaintiff's right to export it in like containers."

A. The memorial addressed to the Puerto Rican legislature.

Respondent's brief (p. 19) mentions a Memorial or petition addressed by certain Puerto Rican distillers to their legislature. (See also Intervenor, brief, p. 29.) A copy was attached to petitioner's bill of complaint (R. 39-55). It urged the legislature to make permanent the temporary laws of May 15, 1936 (Act No. 115) and June 30, 1936 (Act No. 6), which are quoted in petitioner's main brief, pages 6, 7, 8. It contains a direct attack upon petitioner (although not by name), the admission that the continental United States market is the one aimed at, a legal argument to resolve doubts expressed concerning the constitutionality of this legislation, and contains such phrases as these (R. 45-46):

"Should *this foreign producer* be allowed to come to Puerto Rico he will enjoy a singular advantage because of his world famous name * * *."

"* * * *This foreign producer* has already attempted to locate within the boundaries of the continental United States in the city of Philadelphia, where he failed in his plans.

"It has been argued also that the *foreign producer, if he is not allowed to locate here,* will go elsewhere in American territory. * * * So far as another attempt to locate in continental United States is concerned, it can be definitely stated that such an attempt will not be made by *the foreign producer.* * * *" (Italics supplied)

This Memorial signed by intervenor, among others, nd which resulted in the passage of the offending statte, refers solely to appellee who was originally located n the City of Philadelphia (R. 141).

Petitioner and petitioner alone is aimed at by a deceptive and craftily drawn statute. The purpose was to hit petitioner only but to make arguable the contention that it was not. This is not denied except for the half hearted assertion (Respondent, brief, p. 72) that "it does not appear that any other alien manufacturer whose trade-marks had not been used in Puerto Rico prior to February 1, 1936, appears as yet to have challenged the Act, * * *." Petitioner may distill any amount of rum in Puerto Rico so long as it does not call it "Bacardi" rum in the United States. It is not a statute aimed at foreign corporations. Several of these produce rum in Puerto Rico. It is not a statute aimed against trade-marks generally which are not indigenous to Puerto Rico. Many such marks are now legally in use on rum produced there, saved by retroactive legislation embodying an arbitrary date. It is a statute to prevent petitioner from using its particular trade-marks because the legislature believes that consumers in the United States are more likely to purchase "Bacardi" rum made in Puerto Rico than they are to purchase a competing brand not so highly reputed.

Whether the legislature is right or wrong in its opinion—and the statistics of shipments of rum appearing in Appendix C to our main brief show that this is not wholly true—it has far overstepped the limits of its power. Nothing in the Organic Act gives it authority to coddle a favored few distillers in the markets of the United States, a jurisdiction far removed from its legislative sphere. The legislature is attempting to exercise more than "local" powers and the attempt must be restrained as an improper exercise of its limited police power.

B. The Commerce Clause is applicable to Puerto Rico.

The respondent (Brief, pp. 32-37) is quite certain that the commerce clause of Art. I, Sec. 8, cl. 3 of the Constitution can have no application to Puerto Rico. The intervenor (Brief, pp. 52-59) is more doubtful but thinks that, in any event, the effect of the statute upon interstate commerce is incidental. (pp. 56-57) Both rely upon the word "states" in that clause as a restrictive term which may not be enlarged to include territories.

Since our main brief was filed, we have noted the case of *Inter-Island Steam Navigation Co.* v. *Hawaii,* 305 U. S. 306, affirming 96 F. (2d) 412. In that case a steamship company doing an inter-island business in the territory of Hawaii but carrying some goods consigned to foreign ports, attacked a territorial statute levying fees upon public utilities. The attack failed but both courts had occasion to consider the application of the commerce clause to the territory of Hawaii. The Circuit Court of Appeals for the Ninth Circuit said (96 F. (2d) 412, 416-417):

> "Inasmuch as it has been said that 'Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines' (*Galveston, Harrisburg, etc., Ry. Co.* v. *Texas, supra,* 210 U. S. 217, 225, 28 S. Ct. 638, 639, 52 L. Ed. 1031), we think, as a practical matter, a territory must be considered in the same category as a state, and that the commerce clause is applicable to such territory. If that point was not expressly so decided in *New Mexico ex rel. McLean* v. *Denver & Rio Grande R. Co.,* 203 U. S. 38, 27 S. Ct. 1, 51 L. Ed. 78, and *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617, 23 S. Ct. 214, 47 L. Ed. 333, it was so implied. Cf. *Lugo* v. *Suazo,* 1 Cir., 59 F. 2d 386, 390."

Mr. Justice Black, speaking for this Court, stated (305 U. S. 306, 313-314):

> "Under the Constitution, Congress has the power to regulate interstate commerce. Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an Act to which Congress expressly subjected petitioner does not violate the Commerce Clause.
>
> Congress had the power to subject petitioner to this tax by virtue of its authority over the Territory, in addition to its power under the Commerce Clause."

The territory of Hawaii, like that of Puerto Rico is governed by virtue of an Organic Act passed by Congress. If the commerce clause applies to Hawaii, it applies equally to Puerto Rico.

Regardless of this question, however, respondents have not answered the proposition in our main brief, pages 62-68, that the transportation of rum from state to state of the United States, until it reaches the place of ultimate sale and consumption, is unquestionably "commerce" within the constitutional meaning and protection. It is an inseparable part of the traffic originating in Puerto Rico and the commerce clause applies to the whole movement regardless of local law. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 58:

> "Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 468."

See also *Currin* v. *Wallace*, 306 U. S. 1, 10.

We shall not repeat the arguments in our brief heretofore filed showing that the effect of the Puerto Rican statute upon this commerce is direct and not incidental. There is a collision here between the police power of Puerto Rico and the commerce clause. It needs no citation of authority to prove that, in such a conflict, the police power relied upon by respondents cannot prevail over the Constitution of the United States.

C. The Twenty-First Amendment to the Constitution does not aid respondents.

The intervenor does not rely upon the Twenty-First Amendment as enlarging the powers of Puerto Rico (Except incidentally, brief, p. 29). The respondent contends (Brief, p. 31) that the amendment "leaves the states and territories wholly free to adopt and enforce such regulations as they may see fit concerning the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors."

We agree with this statement and with the holding of the cases cited in support of it, such as *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 and *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401. But the present case before this Court has nothing whatever to do with the importation of intoxicating liquors into Puerto Rico or into any other place which prohibits or restricts importation. This case is concerned with rum manufactured in Puerto Rico and then exported from the Island.

It is perfectly true that the Amendment in question has abrogated the commerce clause with respect to "importations" of liquors into a state (*State Board of Equalization* v. *Young's Market Co., supra,* at p. 62) and to that extent has increased the scope of local

police power. It has nothing to do with "exportation" from a state or territory. It is not true that the Amendment touches the present situation at any point or in any way supports the action of Puerto Rico in passing the laws here under attack.

D. The conflict with due process and equal protection.

The intervenor argues that there has been no threatened taking of petitioner's property by the law in question. (Brief, pp. 23, 24.) This is apparently upon the theory that petitioner may still do business in Puerto Rico after compliance with the law. But the record shows and the trial court found (R. 112-114) that petitioner would suffer great loss of business and damage if it were compelled to operate under trade marks other than its own and to forego making shipments of rum in bulk from Puerto Rico.

The respondent's brief says as little as possible directly about either due process or equal protection, although a great deal about curing "evils" attendant upon the sort of free competition to which we had supposed the United States to be long committed as a matter of considered policy. (See, for example, brief, pp. 66-73.)

The intervenor, on the other hand, makes the curious statement (Brief, p. 32):

> "Petitioner's argument proceeds upon the theory that the legislation applies only to foreign manufacturers. This is wholly erroneous. The legislation forbids the use of foreign labels by any manufacturer."

Certainly the argument in our main brief upon equal protection of the laws, pages 36-48, made no contention that the Puerto Rican laws apply only to foreign

manufacturers. As we pointed out, other corporations organized outside of Puerto Rico are manufacturing rum there but are not affected by this legislation. (R. 173.) What we did say was that the laws attacked applied only to petitioner, a corporation of the State of Pennsylvania. Nor does this legislation, as intervenor says, forbid the use of foreign labels by any manufacturer. At least three other corporations are using such labels without violating the law. (Finding 20, R. 114.)

On the contrary, the prohibitions in the legislation are much more specific and much better aimed. The use of the so-called foreign labels is forbidden only if the user was not actually producing rum in Puerto Rico on February 1, 1936. Both petitioner and the respondents agree that the purpose was to exclude petitioner's trade marks from competition, in the United States market, with trade marks, foreign or domestic, used there by other Puerto Rican distillers. In theory, at least, this would make it easier for the other distillers to sell their rum in the United States because the Bacardi marks, already known there, would be eliminated.

Neither the respondent nor the intervenor has offered any explanation of why the legislature weakened and, in Section 7 of Act 149 of May 15, 1937 (quoted in our main brief, page 9), allowed a trade mark already in use in the United States to be used on Puerto Rican rum, even though the user was a new distiller, not in business on February 1, 1936. We do not of course have the answer to this phenomenon, which has the effect, on the Puerto Rican theory, of still providing some real competition in the United States market. From our point of view, this Section 7 merely intensifies the discrimination practiced against

petitioner, the only manufacturer whose product must be marketed under an assumed name. Certainly the exemption contained in Section 7 completely refutes the argument made by the intervenor about classifications by well and lesser known trade names (Brief, pp. 35-37.)

The argument of the intervenor on classification ignores realities. Here the legislature has intentionally carved out a special class, or sub-class, narrow enough to contain only petitioner. In support of this action it is not enough to say that there may be a classification based upon trade marked as against non-trade marked goods (*Old Dearborn Co.* v. *Seagram Corporation,* 299 U. S. 183) or a classification to continue a long existing differential between well known and less known brands of milk (*Borden* v. *Ten Eyck,* 297 U. S. 251). What is needed and cannot be found, is a justification for a discrimination between the well known* name and trade marks of petitioner on the one hand and all other trade marks, whether well known or not, on the other.

The respondent seeks to avoid the violations of due process and equal protection by indirection and by the argument that Puerto Rico has practically unlimited power to legislate for the regulation of the liquor industry. (Brief, pp. 30-31, 37, 56-58.) The cases relied upon, so far as they deal with intoxicating liquors, are the familiar ones under the Twenty-First Amendment (*State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401); those illustrating the right of a state to refuse a license entirely (*Premier-Pabst Co.* v. *Grosscup,* 298 U. S. 226); and the case of *Ziffrin* v.

*The intervenor uses the words "fame and notoriety" (Brief, p. 37).

Reeves, 308 U. S. 132, where *all* distillers in the State of Kentucky were required to ship their product by railroads or railway express companies. If the Kentucky statute had limited transportation service to one out of many common carriers, or had permitted all common carriers but one, for example the Louisville & Nashville Railroad, to render such service, a situation somewhat analogous to this case would have been presented.

As we stated in our main brief, page 51:

> "Respondents cannot cite any cases which will support the theory of unlimited legislative license to coerce a liquor manufacturer in the position of this petitioner. The leading case on regulation of intoxicating beverages expressly points out the limits beyond which state regulations may not go." (Citing and quoting from *Mugler* v. *Kansas*, 123 U. S. 623, 663-664.)

That statement still holds true. Furthermore it is perfectly apparent that these statutes are not regulations of the liquor industry *qua* liquor. They are attempts to regulate the use of trade marks and trade names. We repeat that they promote neither safety, health, morals, good order nor the general welfare. They are in aid of private greed and not public weal. They are "an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date." (*Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266, 274.) They enact into law that species of special privilege sought by all selfish persons in all types of industry.

II.

The Conflict with the Inter-American Convention for Trade-Mark and Commercial Protection.

The intervenor's brief, pages 38 *et seq.*, treats this question on the merits and attempts a direct answer to the contentions made in our opening brief, pages 23-33. This being so, there is a conflict of argument which this Court will have to resolve and no reply is necessary, except to one statement made by intervenor. (Brief, p. 49.) It is said that by registering a trade mark in one of the countries which has adopted the treaty, a corporation could force itself upon any contracting country which had denied it the privilege of doing local business.

No such contention as this has been or is made by petitioner. The ownership or right to use a trade mark is not the same thing as a license to engage in business and does not carry with it any such license. What we do say is that this treaty guarantees to petitioner, who has the right to use certain trade marks, first registered in Cuba and thereafter admitted to registration and used in the United States and Puerto Rico, that these marks, and hence petitioner, shall not be discriminated against by reason of the very fact of the foreign origin and use. What the treaty does is to require that each signatory country permit the free use of lawfully acquired trade marks in the course of lawful trade.

To fully understand the position of Puerto Rico here, it is necessary to go back to the original discriminatory statute of May 15, 1936 (Act No. 115). That act provided:

> "If any kind, type, or brand of distilled spirits of a foreign origin becomes nationally or internationally known by reason of its bearing or show-

ing as its brand, trade name, or trade-mark, the proper name of the manufacturer thereof, such name shall not, in any manner or form whatever, appear on the labels for any distilled spirit of said kind or type manufactured, distilled, rectified, or bottled in Puerto Rico."

"No holder of a permit under this title shall manufacture, distill, rectify, or bottle, either for himself or for others, any distilled spirit locally or nationally known under a brand, trade name, or trade-mark previously used on similar products manufactured in a foreign country, or in any other place outside Puerto Rico; Provided, (1) That such limitation, aimed at protecting the industry already existing in Puerto Rico, shall not apply to any brand, trade name, or trade-mark used by a manufacturer, rectifier, distiller, or bottler of distilled spirits, manufactured in Puerto Rico on February 1, 1936; and (2) such restrictions shall not apply to any new brand, trade name, or trade-mark which may in the future be used in Puerto Rico."

We think it is conceded that these words were aimed at petitioner and its Cuban trade marks. We think it is likewise conceded that the law in permanent form, Act No. 149 of May 15, 1937, had an exactly similar purpose although by that time the legislature had dropped the reference to "distilled spirits of a foreign origin", "nationally or internationally known". The final law (Section 44) condemns the use of:

"any trade-mark, brand, trade name, commercial name, corporation name, or any other designation, * * * used previously in whole or in part * * * anywhere outside the Island of Puerto Rico;" et cetera.

There is no question that the legislature in both instances sought to kill the Bacardi trade marks and

those only. We are perfectly willing to grant that the animus displayed by the Puerto Rican legislature was not directed against these trade marks because they were Cuban rather than, let us say, British. The legislature attacked them because they, as foreign marks, were widely and favorably known outside of Puerto Rico. This type of discrimination is one of the things that the Inter-American Convention was designed to prevent.

Respondents argue at length that the words "protect" and "protection" in the treaty refer only to acts of piracy by competitors. We prefer to think that, for the reasons stated in our first brief, they are terms broad enough to restrain a dependency of the United States from refusing recognition to trade marks of Cuban origin simply because they have built up a widespread good will.

The argument by respondent (Brief, pp. 45-47, 50-55) that to apply the treaty in this case for petitioner's protection would repeal the registration provisions of the Federal Trade Mark Act of 1905 (c. 592, 33 Stat. 724, 725, Title 15, U. S. C. Sec. 81) seems beside the point. This is especially true since petitioner's trade marks have been in actual use in Puerto Rico and the United States for many years and are properly registered there. (Finding 7, R. 110.)

III.

The Conflict with the Federal Alcohol Administration Act.

Respondent suggests (Brief, pp. 38-39) that this question is not properly here because petitioner did not assign any cross error to the failure of the District Court to find in its favor in this point. There was no necessity for the assignment of cross errors on appeal to the Circuit Court of Appeals. Errors

can be assigned only to the decree of the court and that of the District Court was entirely favorable to petitioner. Cross errors are not assignable to the reasons or opinions supporting such a favorable decree. The issue of conflict with the federal statute was briefed and argued in the Circuit Court of Appeals and was decided by that court.

The briefs of both respondent (pp. 38-42) and intervenor (pp. 60-64) deny the presence of a conflict between the federal law and the Puerto Rican. Yet neither can explain why petitioner's label, approved under federal law (which requires it to contain adequate identification of the maker and his brand and prohibits it from creating a misleading impression even by omission) is not in violation of the Puerto Rican laws.

Petitioner's brand and the distinctive part of its corporate name are both trade marks, first registered in Cuba and used all over the world as well as in Puerto Rico. These must be shown on the label in order to comply with the regulations under the Alcohol Act. (R. 331, 333.) To omit them from the label would be to "create a misleading impression". (R. 342.) And yet the trade-mark (the bat) on the label and the corporate name are within the express prohibitions of Section 44 of the Puerto Rican law No. 149, May 15, 1937. No amount of argument can remove this conflict. As for the prohibition against bulk shipments, it must stand or fall as an integral part of the trade mark prohibition.

Respondent concedes that petitioner has a right to use its corporate name on rum produced by it in Puerto Rico; indeed counsel say that petitioner expressly is required to use its name because Section 40 of the Puerto Rican statute, quoted on page 41 of Respon-

dent's brief, states that the label shall contain *the name of the bottler* or canner. There is no reference to the name of the distiller or rectifier. We doubt if the Puerto Rican government could be bound by this concession which is made for the first time in this Court. The proponents of this legislation have been anxious that petitioner's "famous name" shall not be applied to its product, and a private right of enforcement of the prohibition is provided by Section 97a. In any event it is the name of the manufacturer that is important, in this case. We doubt if the words of Section 40 can override the express prohibitions of Section 44 that no "trade-mark, brand, trade name, commercial name, *corporation name* or any other designation" if used previously "in whole or in part, directly or indirectly or in any other manner anywhere outside the island of Puerto Rico" may appear upon any distilled spirits manufactured in Puerto Rico unless used there on or before February 1, 1936. The essential part of Petitioner's corporate name—the word "Bacardi"—was used outside of Puerto Rico before February 1, 1936 and it is therefore, we should suppose, within the ambit of Section 44.

Intervenor makes the same concession (Brief, p. 23) where it says "The Puerto Rican law does not deny petitioner the right to do business in Puerto Rico nor to sell lawfully distilled rum under the Bacardi trade name".

Petitioner does not consider it prudent to rely on these belated concessions without a judicial declaration that the construction of the Act now advanced by Respondent and Intervenor is correct.

Within the current year this Court has considered the effect of a direct conflict between the statute of a state and an order of a federal commission. In *Mau-*

rer v *Hamilton,* 309 U. S. 598, a Pennsylvania statute denied the use of the state highways to a motor vehicle carrying any other vehicle over the head of the operator. The Interstate Commerce Commission had held that this type of operation was permitted by its regulations, in the case of motor carriers subject to its jurisdiction. This Court took due notice of the conflict in a long and exhaustive opinion but held that Congress had reserved to the states, and withheld from the Commission, the regulation of "sizes and weights", which were involved in the case. Had the opinion found that the Commission was acting within the scope of its authority, the state would have been compelled to yield.

In the present case the Federal Alcohol Administration Act, Section 5(e) requires that all distilled spirits moving in commerce shall be labeled in accordance with the Act (Quoted, Appendix B of our original brief) and that a certificate of label approval shall be first obtained from the administrator in accordance with regulations to be prescribed by him. Petitioner's label has been approved in accordance with Section 5(e) and the regulations under it and petitioner has received a certificate of label approval from the administrator. (R. 274-277.)

Respondents do not challenge the power of the administrator to approve this label (Shown on page 5 of our original brief) or to issue his certificate of approval. They argue that the label violates the provisions of Article 44 of the Puerto Rican law of May 15, 1937; and yet they say that there is no conflict with the federal act and regulations, even though the Puerto Rican law will not permit the label to be used upon rum shipped to the United States. In our view the conflict in this respect is direct and primary and cannot be explained away.

The whole policy of Congress in enacting legislation of this character was, subject to the restraints of the Twenty-first Amendment not applicable here, to gather into its own hands the full power over the transportation of intoxicating liquors from place to place. What Puerto Rico may do in regulating local consumption is one thing, but it lacks the power to flout an act of Congress in matters dealing with exportation and sale beyond its boundaries.

IV.

Petitioner is Not Estopped.

The intervenor's brief, page 15, argues that petitioner is estopped to question the validity of the Puerto Rican statutes because it applied for and received a permit to manufacture thereunder. Respondent does not argue this point, merely noting it on page 3 of the brief.

This particular argument has been raised at intervals during the case and apparently abandoned at others. The intervenor presented it in opposition to the motion for a preliminary injunction but did not brief it when the case was submitted to the trial court on the merits. It was raised again in the Circuit Court of Appeals but not mentioned in the oppositions to the granting of the writ of certiorari. Neither the District Court nor the Circuit Court of Appeals passed upon the question.

Petitioner did not apply for or receive any permit under Act No. 149 of May 15, 1937, the only statute here attacked. It did apply for a permit to manufacture on March 31, 1936, under the provisions of Act No. 38 of 1935. (R. 312-313.) At that time the Puerto Rican statutes did not discriminate against petitioner or its trade-marks. On April 6, 1936 the treasurer of

Puerto Rico replied, setting out certain additional requirements for the issuance of the license (R. 313-315). The non-discriminatory act of 1935 was still in effect.

On May 15, 1936, Act No. 115 was approved, to remain in effect only until September 30, 1936. It contained the first reference to distilled spirits of foreign origin, nationally or internationally known. While this temporary act was in effect, and on July 16, 1936, petitioner, having complied with the requirements for a permit laid down by the treasurer, again requested that it be issued. This letter stated, in part, (R. 316-317):

> "This petitioner respectfully informs the treasurer that in its opinion law No. 115 of May 15, 1936 contains provisions which are unconstitutional or otherwise illegal, and the applicant therefore reserves its constitutional right to submit to the courts the validity or legality of any section a part of this or any other law or regulation whenever it deems it advisable."

On July 20, 1936 rectifier's and distiller's permits were issued to petitioner (R. 288, 315).

On September 28, 1936, law No. 6 of June 30, 1936 became effective, amending the Act of May 15, 1936 and continuing the provisions discriminating against petitioner until September 30, 1937. This law did not become effective until 90 days after its passage, because passed at a special session by less than a two-thirds vote. (Sec. 34 of Organic Act of Puerto Rico, Title 48 U. S. C., sec. 827, and Respondent's brief, p. 5, Note 4*). Petitioner (R. 315) then inquired whether new permits were necessary. It was advised by the

*Intervenor's brief, pp. 8 and 19, incorrectly states the effective date to be July 1, 1936.

treasurer, September 29, 1936, (R. 315-316) that new permits were not necessary and no additional permits were in fact issued, nor have the original ones been withdrawn or revoked.

The first permanent act affecting petitioner was No. 149, May 15, 1937, against which this suit was brought. The others, not here attacked, were, by their terms, temporary and *experimental in their nature* (See respondent's brief, p. 4) to remain in effect only for short times. Petitioner never sought to receive or received a permit under the permanent Act of May 15, 1937. It properly waited to attack the discriminatory provisions until such time as the legislature made up its mind to retain them and then petitioner acted with reasonable promptness, filing its bill for an injunction on July 31, 1937.

Even if petitioner had sought and received a license to manufacture under the Act of May 15, 1937, it would still not be estopped to question the constitutionality of that Act. *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452; *Union Pacific Railroad Co.* v. *Public Service of Missouri,* 248 U. S. 67.

In the *Cargill* case, above cited, it was contended that the acceptance of a license would bind the corporation to observe all the laws and regulations under which the license was issued, even though same might be unconstitutional. As to this the Court said, page 468:

> "The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repug-

nant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

None of the cases relied upon by the intervenor (Brief, pp. 15-22) touch a situation where permits were issued prior to the passage of the Act complained of, and where no revocation of these permits was ever attempted. There can be no estoppel in this case.

Respondent argues (Brief, p. 13, Note 8) that petitioner must have known, when it was completing its plans for manufacturing rum in Puerto Rico, that the legislature was about to pass an act (No. 115, May 15, 1936), a portion of which was aimed against petitioner. There is nothing in the record to show the petitioner did know of this fact but respondent says that the bill must have been introduced as early as March 21, 1936, and that, as introduced, it operated as a sort of constructive notice of coming events.

The Act of May 15, 1936 was a long statute dealing with all phases of the liquor industry in Puerto Rico and only incidentally, in parts of Section 41, with the prohibition against famous names. It was introduced approximately four weeks after petitioner first entered Puerto Rico (R. 140-141). There is nothing in the record to indicate that the offending provisions of the statute were contained in the bill as introduced and

petitioner is informed that such provisions were offered by way of amendment during the closing days of the legislative session.

At any rate, prior to the date of the passage of the Act, petitioner had expended about $45,000 (R. 6), had rented a building, and moved certain equipment and materials from Pennsylvania to Puerto Rico (R. 140, 141, 143). Even if the offending provisions of the statute had appeared in the bill as originally introduced, petitioner would have been justified in continuing its investment rather than to take a substantial loss and leave the Island.

The complete answer to respondent's argument, for whatever the argument is worth, is that no man is compelled at his peril to guess the outcome of pending legislation. *Untermyer* v. *Anderson,* 276 U. S. 440, 445-446. As the Court there said: "The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

CONCLUSION.

We have not heretofore replied directly to the many assertions, particularly in respondent's brief, that the provisions of the law of May 15, 1937 which discriminate against petitioner, are for the benefit of Puerto Rico and its people generally. This thesis that the legislation was really for the general welfare, has always seemed to us untenable, entirely apart from the question of power to legislate.

It must be borne in mind that the legislation's effect is to restrict sales in the United States market to rum which bears identifying marks not disapproved by Puerto Rico. Necessarily it is to the interest of Puerto Rico to sell as much rum as possible in that market

since tax revenue accrues in direct proportion to the amount sold and employment of labor in Puerto Rico is increased to some extent as sales increase.

It is hardly possible to infer that if petitioner is barred in Puerto Rico from selling rum in the United States under identifying marks known to the public, the sales lost by petitioner would immediately accrue to its competitors among the distillers of Puerto Rico. But unless we make this assumption, Puerto Rico is actually going to lose money through the enforcement of this law.*

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*The annual report of the treasurer of Puerto Rico to the governor of the island for the fiscal year 1938-39, page 27, shows revenue derived from Puerto Rican rum shipped to the United States, all accruing to Puerto Rico, as follows:

"*Federal Taxes.*—Federal taxes paid on Puerto Rican rum shipped to the continental United States amounted to $1,631,628.49 during the year, which represents an increase of $229,170.16 over the income of $1,402,458.33 from this source during the previous fiscal year. The steady increase in revenues from this source since July 1, 1935 continues, which shows that the local rum industry is more than ever making sure and important inroads into the continental markets. An interesting study of this progress may be made from the following table, which shows monthly income from Federal taxes, by fiscal years, which accrue to the Insular Government:

Month	1935-36	1936-37	1937-38	1938-39
July	$4,030.99	$38,928.90	$177,899.20	$103,196.41
August	10,797.74	47,364.33	103,833.00	78,856.10
September	22,715.41	51,674.78	133,874.00	108,928.74
October	38,858.18	71,956.10	159,136.80	137,138.51
November	56,220.76	86,729.28	188,794.00	205,638.46
December	48,397.96	109,751.19	175,704.96	205,374.26
January	61,653.89	190,542.69	54,565.70	145,349.62
February	26,317.88	94,704.96	71,388.53	91,965.40
March	18,722.70	80,777.20	115,302.52	94,026.33
April	24,391.36	56,510.00	45,221.70	81,692.27
May	22,214.36	52,234.20	74,095.10	154,762.05
June	21,258.92	57,694.40	102,642.82	224,700.34
	$355,579.65	$938,968.03	$1,402,458.33	$1,631,628.49

(*Continued on following page*)

The increase of exports of cases of rum to the United States, from year to year while petitioner has been operating under the injunction of the District Court, as shown in our original brief, Appendix C, indicates that Puerto Rico will continue to derive larger and larger tax revenues from this source. Only a few distillers in the Island, who fear to compete in the open market, have complained and they can hardly be said to represent the general welfare of Puerto Rico, which the legislature may legitimately foster. On the contrary, they represent only their own selfish interests, which should not be permitted to dominate a free market across the ocean from their distilleries. It is significant that originally there were two intervenors who sought a continuance of this attempted legislative monopoly. One of these has abandoned his opposition and has withdrawn from the case.

Petitioner asks that the judgment of the Circuit Court of Appeals be reversed and that the decree of the District Court be reinstated.

Respectfully submitted,

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There were approximately 663,317.20 proof gallons of Puerto Rican rum shipped to the Continent during the year, on which the Federal tax of $2.25 per proof gallon was paid, totalling $1,492,465.62. The Federal Rectification Tax of 30 cents per proof gallon paid on the rum shipped during the year amounted to $139,162.87, making the total of $1,631,628.49."

This is a printed report of 121 pages and charts which will be found, among other places, on file with the Interior Department, Division of Territories and Island Possessions.

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